Revisiting Practical Application of the *Privette* Doctrine

by Cynthia E. Tobisman and David J. Byassee

"Generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work." (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594.)

This rule has been known as the "*Privette* doctrine" since 1993 when the Supreme Court decided *Privette v. Superior Court* (1993) 5 Cal.4th 689, holding that when an independent contractor's employee is injured on the job and thus subject to workers' compensation coverage, he cannot seek recovery of tort damages from someone who hired the contractor, but did not cause the injury. Thus, a roofing employee injured carrying buckets of hot tar up a ladder could not sue the property owner for injuries compensable under the workers' compensation system.

The *Privette* doctrine runs contrary to a natural inclination to characterize the general contractor as the captain of the ship, and the one with whom the buck stops on a construction site. But there is good reason for the doctrine. General contractors hire subcontractors expressly because those subcontractors are experts in what they do, and act independently of the general contractor in performing their work, such that it is fair to put the onus on subcontractors to look out for their own safety – and that of their employees – on the jobsite.

Because *Privette's* rule may be somewhat counterintuitive, defendants have faced an uphill battle in the trial courts convincing judges of the breadth of *Privette*'s application. And plaintiffs routinely seek to go after someone higher in the contracting chain, whether to avoid the workers' compensation exclusivity defense asserted by their employers, or to seek a deep pocket. With predictable regularity, plaintiffs have sought to introduce expert testimony or to point to regulations as a basis for imposing general-negligence duties of care on general contractors and property owners – notwithstanding the fact that such testimony or regulations are irrelevant in the face of *Privette*.

Those efforts by the plaintiffs' bar have yielded a series of Supreme Court and Court of Appeal decisions illuminating and extending the reach of the *Privette* doctrine by making clear that it precludes hirer liability in many instances where an independent contractor's employee (or the contractor himself) is injured on the job. As explained in more detail below, the major exceptions are where (i) the hirer retains control over the work of the independent contractor and exercises that retained control in a manner that affirmatively contributes to injury; (ii) the hirer fails to disclose a preexisting dangerous condition on the property that the contractor could not discover in the exercise of reasonable care; and (iii) the hirer provides defective equipment to the contractor and the contractor's employees are injured while using the equipment.

Privette and its progeny provide ammunition to defense counsel seeking to shut the door on claims against property owners, general contractors and other hirers of independent contractors. For example:

- **Failure to specify precautions**. *Toland v. Sunland Housing Group, Inc*. (1998) 18 Cal.4th 253: The Supreme Court rejected hirer liability where the hirer failed to specify in its contract that the contractor should take special precautions to avert a peculiar risk: A hirer "has no obligation to specify the precautions an independent hired contractor should take for the safety of the contractor's employees." (*Id*. at p. 267.) Although a person hiring an independent contractor to do inherently dangerous work can be liable under the peculiar risk doctrine for failing to see to it that the hired contractor takes special precautions to protect neighboring property owners or innocent bystanders, there is no obligation to specify the precautions that the contractor must take for the safety of *the contractor's own employees*. (*Ibid*.)

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- **Failure to exercise retained control**. *Hooker v. Dept. of Transp*. (2002) 27 Cal.4th 198: The Supreme Court held that even where a hirer retained general control over safety, its failure to exercise that control did not subject the hirer to liability. "We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at the worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control affirmatively contributed to the employee's injuries." (*Id*. at p. 202.) "The mere failure to exercise a power to compel the subcontractor to adopt safer procedures does not, without more, violate any duty owed to the plaintiff." (*Id*. at p. 209.)

- **Other subcontractors' negligence**. S*heeler v. Greystone Homes, Inc.* (2003) 113 Cal.App.4th 908: The Court of Appeal held that a general contractor was not liable when a subcontractor injured another subcontractor's employee: "[T]he limitations on hirer liability in *Privette* and its progeny apply even when injuries to a subcontractor's employee are not the result of the subcontractor's own negligence, but arise from the activities of neighboring subcontractors." (*Id*. at p. 922, fn. 8.)

- **When no workers' compensation benefits are available to injured contactor**. *Tverberg v. Fillner Construction, Inc*. (2010) 49 Cal.4th 518: The Supreme Court held that a hirer is not liable where an independent contractor (rather than the contractor's employee) is injured and the contractor was not entitled to workers' compensation benefits. Relying on the hirer's presumed delegation to the contractor of responsibility for workplace safety, the Supreme Court held that the contractor "has authority to determine the manner in which inherently dangerous ... work is to be performed, and thus assumes legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions." (*Id*. at p. 522.)

- **Enforcing statutory safety regulations**. *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590. The Supreme Court held that Cal-OSHA could not be used to impose general-negligence duties of care in cases governed by *Privette*. There, a maintenance worker who was injured while performing work on a baggage conveyor belt sought to rely on Cal-OSHA safety requirements to show that the hirer owed a duty of care. The Supreme Court rejected this argument, holding that Cal-OSHA could not be used to expand hirer liability beyond *Privette's* mandates. (*Id*. at p. 601.) Rather, all safety duties were implicitly delegated as a matter of law to the contractor.

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- **General contractor's scheduling of subcontractors**. *Brannan v. Lathrop Constr. Assn., Inc.* (2012) 206 Cal. App.4th 1170: The Court of Appeal held that a general contractor's act of scheduling of the work of various subcontractors on a project does not suffice to bring the claim outside of *Privette's* rule of non-liability.

These cases teach that in order to fasten liability on a property owner or hirer of an independent contractor, an injured contractor or employee of a contractor must establish that the hirer retained control over the specific instrumentality that caused the injury, and negligently exercised that control in a manner that affirmatively contributed to the injury. The mere fact that a hirer has retained control over safety or scheduling will not suffice. Nor is it enough that a dangerous condition existed on the work site; if that dangerous condition was evident to the subcontractor, who was free to take steps to safeguard his or her own safety, the hirer is not liable. The fundamental premise here is that the hirer can and is presumed to have delegated safety to the independent contractor.

Even in cases where the facts suggest that the hirer retained control and affirmatively contributed to the injury, if the injured worker was under the hirer's control and direction, the hirer may be able to argue that the special employment doctrine serves as a defense to liability. The special employment doctrine serves to bring the employee of an independent contractor within workers' compensation exclusivity for the hirer as a "borrowed" employee in the same way that workers' compensation exclusivity would apply to the hirer's own employee. (See, e.g., *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 174-175.) Contract language identifying the worker as an independent contractor and not an employee is not determinative. (*Id.* at 176.)

Despite the breadth of *Privette* and its progeny, plaintiffs are likely to rely on a handful of cases that apply to special circumstances to seek to fasten liability on hirers. For example:

- **Contractual safety preclusion**. *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120, held that a general contractor may be liable for injury to the employee of a subcontractor when the general contractor *contractually precluded* the subcontractor from implementing the precise safety precaution that the plaintiff contended was necessary to protect the public, including the subcontractor's employee. (*Id.* at p. 1134; but cf. *Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal.App.4th 52, 66 [distinguishing circumstance of contractual retention of exclusive control].)

- **Hidden property defects**. *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, held a landowner liable to an employee of an independent contractor to the extent that the landowner knew or should have known of a latent or concealed preexisting hazardous condition that the contractor did not know of and could not have reasonably discovered, and the landowner failed to warn the contractor of the condition. (*Id.* at p. 664.)

- **Providing unsafe equipment**. *McKown v. Wal-Mart Stores, Inc.* (2004) 27 Cal.4th 219 held that a hirer was liable to an employee of an independent contractor on the basis that the hirer's provision of unsafe equipment affirmatively contributed to the employee's injury. (*Id.* at p. 222.)

In addition to these cases, *Elsner v. Uveges* (2005) 34 Cal.4th 915 contains language suggesting that Cal-OSHA may be used to establish standards and duties of care. However, *Elsner* involved the hirer's *direct negligence* in providing unsafe scaffolding. (*Id.* at p. 924.) *SeaBright* subsequently and unambiguously repudiated the argument that Cal-OSHA duties are nondelegable and thus made clear that Cal-OSHA does not provide an avenue to end-run *Privette*.

A recent case — *Vargas v. FMI, Inc.* (2015) 233 Cal.App.4th 638 — opens the door to the possibility of hirer liability resulting from certain other statutory and regulatory duties, or work under a franchise. (See *id.* at p. 654 [hirers held liable for injury to independent contractor truck driver when his co-driver crashed the truck they were driving; distinguishing *Privette* on the basis that *Vargas* involved duties "to protect the public" owed pursuant to the federal Motor Carrier Act and a "franchise granted by public authority" (*i.e.*, a federal motor carrier permit)].) According to *Vargas,* the court's task is "to review the pertinent statutes and regulations to determine whether they preclude the applicability of the *Privette* doctrine and prohibit delegation of the hirer's tort law duty in the particular case." (*Id.* at p. 654.) But *Vargas* cannot countermand *SeaBright.* And *Vargas*'s citation to *Evard v. Southern California Edison* (2007) 153 Cal. App.4th 137 as holding that certain safety duties under California's General Industry Safety Orders were nondelegable, is arguably infirm as *Evard* was effectively overruled by *SeaBright*. Thus, properly viewed, *Vargas* was an instance of federal law preemption and supremacy. Nonetheless, *Vargas* is likely to foster further challenges to the *Privette* doctrine.

In sum, *Privette*'s general rule of non-liability remains a potent weapon for defense counsel representing property owners and other hirers of independent contractors. While a handful of outlier cases may test the breadth of *Privette*, the Supreme Court's recent jurisprudence, as well as a raft of decisions from the Courts of Appeal provides a vanguard for defeating those efforts.

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